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# NO HARM, NO FOUL: ABORTION AND THE IMPLICATIONS OF FETAL INNOCENCE

Kenneth Einar Himma

Christianity is generally thought to entail a pro-life position on abortion rights. Since the fetus is a person, on this view, from the moment of conception, abortion is murder and hence should be legally prohibited. In this essay, I will concede for the sake of argument the claims that the fetus is a person and that abortion is murder, but I will argue that a Christian can coherently hold that abortion should be legally permitted anyway. The argument will principally be based on claims regarding the ultimate fate of moral innocents and certain commonly accepted liberal views on the boundaries of morally legitimate lawmaking authority.

It is commonly taken for granted that some set of tenets central to Christianity entails what I will call the Conservative View of Abortion. The essentials of this view are well known, so I will describe them only briefly. According to the Conservative View, personhood begins at the moment of conception<sup>1</sup>; conception, then, is the event that brings a new person into the world – though its existence will obviously depend in a very intimate way on its mother for a period of nine months. Since the fetus is a person from the moment of conception, it has a right to life from that moment on that is violated by abortion. Abortion, thus, constitutes murder in violation of the Sixth Commandment and is hence always a sin.

The Conservative View, however, is not limited to taking a position on the morality or sinfulness of abortion; it also involves a political position with respect to what the law on abortion should be. This part of the view is not always made explicit, but I take it that the essentials are as follows. No state can be legitimate unless it protects innocent persons from grievous harm. Since the state is therefore morally obligated to prohibit the intentional killing of innocent persons and abortion always involves the intentional killing of an innocent person, it follows that the state is obligated to prohibit abortion.

In this essay, I attempt to construct an alternative to the Conservative View. My efforts, however, will not require challenging the assumption that the fetus is a person at the moment of conception. Indeed, I will assume that this is true and hence that abortion is always murder, but argue that a Christian can coherently hold that it should be permitted anyway.<sup>2</sup> The argument will principally be based on claims regarding the ultimate fate of moral innocents and certain commonly accepted liberal views



on the boundaries of morally legitimate lawmaking authority.

The analysis is intended not as a refutation of the Conservative View, but as an attempt to construct a coherent liberal position on abortion out of materials that are available to Christians. As an empirical matter, of course, conservative Christians will likely reject some of these premises. But, again, the point here is only to build a coherent pro-choice position on the strength of religious, moral, and political doctrines that are still in play among Christians. Thus, while I think the analysis here puts a difficult question to the Conservative View, the reader who is expecting an attempt to refute that view will be disappointed.

### *I. The Noncoincidence Thesis*

I begin with a thesis that I assume (and hope) is uncontroversial among Christians:

**The Noncoincidence Thesis:** There are sins that cannot legitimately be prohibited by the state.

The Noncoincidence Thesis, then, simply asserts that it is morally impermissible for the state to criminalize every sin. Insofar as the Noncoincidence Thesis denies that the state has unlimited authority to prohibit and punish what is morally objectionable, it is a moral thesis about the limits of the legitimate use of the state's coercive power.

A cursory inspection of the Ten Commandments discloses a number of sins that are not legitimately restricted by the law and thus confirms the plausibility of the Noncoincidence Thesis. For example, it would clearly be illegitimate to criminalize the coveting of another person's goods or spouse. One obvious problem with such a prohibition is that, in the vast majority of instances, it is impossible to verify that a coveting has taken place with sufficient reliability to warrant the application of coercive force. Since, as a conceptual matter, a mere mental state is sufficient to constitute an instance of coveting and since we lack direct access to the mental states of others, there would be insurmountable epistemic difficulties involved in enforcing such a prohibition.

There is another more serious difficulty. Even if we had an infallible mind-reading device that could ethically be used, it would still be morally problematic for the state to prohibit coveting. It is reasonable to think that the state's coercive force may not legitimately be used to prohibit purely private mental events. Believing something or feeling something may be sinful, but it is not the proper business of the law to enforce the instantiation or non-instantiation of any particular mental state. The law is properly concerned with outward behaviors and not inner events; it is the province of God, and not the province of the law, to judge the contents of a person's mind in the absence of some outward behavioral manifestation.

It is also uncontroversial, I think, that not every sinful *outward* behavior can legitimately be prohibited. The state, for example, has no business making it a crime to dishonor one's parents. Dishonoring a person is just not the sort of behavior the state can legitimately prohibit – at least in the

absence of some substantial injury to economic or reputational interests, such as occurs when one person slanders another. While some instances of dishonorings may involve these types of injury, the sort that is more common to the familial context involves a comparatively private insult that does not culminate in economic or reputational injury. Put that together with the view that the familial context deserves some insulation from state regulation and we have a cogent argument for thinking the state should not coercively enforce the Fifth Commandment.

Likewise, it would be illegitimate for the state to institutionalize either the First Commandment by prohibiting other religions than Christianity or the Fourth Commandment by prohibiting work on Sundays. Of course, one might reasonably take issue with the extent of the separation between church and state that has been read into the First Amendment's Establishment Clause by the Supreme Court. Even so, the principle that fallible human authorities ought generally to allow people to worship as they see fit is an obvious constraint on legitimate lawmaking authority.

There is, I hope, nothing controversial about any of this. While most Christians would probably like to see the state do more in the way of enforcing morality, all but the most radically conservative would concede that there are substantive limits on the state's authority to coercively enforce Christian moral and theological commitments. Most, I trust, would accept the analysis of the examples given above. But, in any event, this much should be clear: there is nothing in the central tenets of Christianity that precludes acceptance of the Noncoincidence Thesis. Accordingly, Christians are free to adopt the Noncoincidence Thesis.

## *II. The Harm-to-Others and Offense Principles*

Assuming the Noncoincidence Thesis is correct, the next issue is to determine the boundaries of legitimate lawmaking authority. Since the Noncoincidence Thesis merely asserts that not every sin can legitimately be criminalized, it tells us very little about how the state may legitimately exercise its lawmaking function and hence about whether abortion may legitimately be prohibited. What we need, then, is a theory of moral legitimacy that distinguishes those sins that are legitimately criminalized from those sins that are not.

The liberal tradition includes a number of different principles of moral legitimacy that ultimately derive from the view that the state should respect citizen autonomy. Some of these are, of course, procedural. Most, if not all, liberal political theorists view democratic procedural constraints as a necessary condition for moral legitimacy. On this familiar view, lawmaking authority is legitimate only to the extent that the lawmakers can fairly be characterized as representing the interests of the people as a whole. And this can occur only in a system where the lawmakers are either the people themselves or are elected by the people in fair elections. Put roughly, then, the underlying idea is that democratic procedures are morally ideal only insofar as they respect the autonomy of citizens by allowing them to participate in lawmaking activities and thereby to govern themselves.

But the liberal tradition also claims there are substantive limits to what can legitimately be enacted into law by democratic processes. A regime is no less totalitarian just because it is democratic. A system of laws that recognizes no limits on what can be required or prohibited by law is a totalitarian system – regardless of how such laws come into being. For example, a norm that prohibits religious worship or bars women from the work force is illegitimate even if it is enacted into law by democratic processes. On this plausible view, which underlies the substantive protections of both the United States Constitution and the Canadian Charter, there are limits on the extent to which a democratic majority may legitimately restrict the freedom of dissenting individuals.<sup>3</sup>

Ultimately underlying this view, as was true of the commitment to democratic procedures, is a commitment to the moral importance of autonomy. Every law operates to restrict the behavior of some class of human beings in some way and hence tends to undermine human autonomy. Accordingly, every law involves some moral disvalue insofar as it undermines human autonomy. Indeed, it is for this very reason that anarchists believe that the exercise of authority over any subject is necessarily inconsistent with respect for the subject's autonomy and *must* hence be morally illegitimate.<sup>4</sup>

Classical liberals, of course, reject the anarchist's claim that all authority is illegitimate, but recognize, as they must, the tension between coercive authority and autonomy, which provides the impetus for philosophical theorizing about political legitimacy. There are a number of different strategies for resolving the apparent tension between the two, but the one that is relevant for our purposes attempts to identify a greater moral good that outweighs the moral cost of restricting autonomy.

The most famous instance of this strategy presupposes that the moral importance of public health and safety outweigh the moral cost of restricting autonomy. According to John Stuart Mill's Harm Principle, a behavior can legitimately be restricted only insofar as such a restriction is instrumental to preventing harm to third parties:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.<sup>5</sup>

As a utilitarian, Mill must ground his views on the limits of legitimate law-making authority in an analysis of the effects of coercively restricting autonomy on human well being. Accordingly, if the promotion of health and safety justifies restricting autonomy, it must be because health and safety are more vital to well being than respect for autonomy – a position that may seem unintuitive in a culture that seems to privilege speech over all other values, but is eminently sensible.

It is worth noting that there are two different thoughts in the passage cited above; and while Mill apparently believes otherwise, they are not logically equivalent. The first is that legal restrictions on the behavior of other

people can be justified only in terms of self-protection; the second is that such justifications must make reference to the prevention of harm to others. While the second entails the first, the converse does not hold – at least not if “harm” is construed in the ordinary sense. For the interest in self-protection might not be limited to the interest in protection from harm as Mill conceives it. Although Mill probably intends his Harm Principle as concerned exclusively with physical and economic harm, there are other sorts of threat that might justify coercive precautions.

Joel Feinberg, for example, argues for the Offense Principle, according to which behavior may legitimately be restricted to avoid offense to others. Feinberg describes the Offense Principle as follows:

It is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end (i.e., there is probably no other means that is equally effective at no greater cost to other values). The principle asserts, in effect, that the prevention of offensive conduct is properly the state's business.<sup>6</sup>

Like the Harm Principle, the Offense Principle rationalizes legal restriction of freedom as a form of self-protection. On this view, legal restrictions on behavior can be justified as a means of preventing “any or all of a miscellany of disliked mental states (disgust, shame, hurt, anxiety, etc.)” resulting from the conduct of others.<sup>7</sup> Thus, for example, the Offense Principle justifies the prohibition of public nudity on the ground that such behavior is likely to cause offense to third parties.

The claim that the Harm and Offense Principles exhaust the substantive limits of legitimate lawmaking authority comprises what I will call the Protection Thesis.<sup>8</sup> Though the Protection Thesis is often thought of as being a modern view, it has been around for many centuries and has been accepted by many Christian thinkers. For example, Peter Abelard held that “all sins are of the mind only,” but nonetheless argued that punishment should be reserved for outward manifestations of culpable mental states that result in harm:

Injury to the soul we do not regard as so much a matter for punishment as injury to others. Our object is to avoid public mischief, rather than to correct personal mistakes.... Everything which is likely to lead to common loss or to public harm must be punished by a greater requital. Where a sin involves more serious injury the penalty must therefore be heavier. The greater the social stumbling-block, the more stringent must be the social correction, even though the original guilt be relatively light.<sup>9</sup>

This passage indicates Abelard accepts both of the two premises I have argued for up until now. Given that sins resulting in no common loss or public harm should not be punished, as the passage above indicates, it follows that, on Abelard's view, not every sin should be punished; thus,

Abelard clearly accepts the Noncoincidence Thesis. Second, given that "injury to others" is the test of whether a behavior should be punished (and hence prohibited by a criminal law), it follows that Abelard accepts the Protection Thesis.

Like Mill, then, Abelard appears to view the function of law as public protection, leaving the judgment of sin to God. As Abelard puts the point:

We reserve, therefore, sins of the soul for the divine judgment.... The degree of contempt displayed by men to God is afterwards proportionately punished, whatever be their condition or calling.... It is the soul in its scheme of intention, not in the outward result of its action, that God assesses.<sup>10</sup>

Thus, whereas human beings may punish publicly harmful manifestations of inward sinful states, it is the province of God to judge a person's moral character.

There are, of course, difficulties associated with the Protection Thesis. In particular, it is not immediately clear how to articulate a coherent set of principles that distinguishes those harms and offenses that justify restricting freedom from those that do not justify restricting freedom. But this is just a specific instance of a general problem that afflicts most attempts to make some moral principle precise and hence should not be considered a fatal objection against the Protection Thesis.

In any event, my point here is to describe, in admittedly rough terms, a particular account of legitimacy that can viably be held by Christians – and not to defend it. Given that the Protection Thesis coheres well with existing constitutional practice, it is a plausible position. Given that there is nothing in the central doctrines of Christianity that precludes accepting the Protection Thesis, it is open to a Christian to accept it – as many have. Thus, the claim that the Harm and Offense Principles exhaust the substantive moral limits on democratic lawmaking authority remains a viable position for Christians.

### *III. The Doctrine of Juvenile Innocence*

As it turns out, it is surprisingly difficult for a wholly secularist approach to justify a legal prohibition of killing under the Protection Thesis in a way that harmonizes with our intuitions. If what justifies a law restricting killing is the harm it causes to the victim, it is difficult to see why the law should regard intentional killing as presumptively wrong. For if the killing is administered in a painless way, something that is easy enough to accomplish, it can plausibly be argued that the victim has not incurred any harm. First, if, as some philosophers believe, harm cannot exist without being experienced in some way,<sup>11</sup> the secularist seems committed to claiming that the victim of a painless killing sustains no harm – either during or after the killing. Second, if, as other philosophers believe, harm must be instantiated by a living subject,<sup>12</sup> the victim's premature death does not constitute a harm; for the victim is no longer the sort of entity that can instantiate harm.<sup>13</sup>

This, of course, is not to deny that there will nearly always be harmful third-party effects resulting from a killing. A murder victim is likely to have friends and relatives who sustain considerable pain as a result of the crime. Obviously, the loss of a friend produces considerable mental suffering to other persons in the form of grief. Less obviously, the loss of a friend may have the effect of making one painfully aware of one's vulnerability – an effect that is exacerbated when the friend's death results from a violent crime.

But the idea that a law criminalizing murder must be justified entirely on the strength of these sorts of third-party effects does not do justice to our intuitions about why intentional killing should be prohibited in circumstances not involving defense against a culpable threat to life. First, of course, whether a killing results in third-party effects will depend on the contingent circumstances of the victim. A killing will not cause appreciable third-party harm if the victim lacks friends and relatives, but the absence of third party effects surely would not justify permitting a murder. Second, and more importantly, a theory that justifies legally prohibiting murder entirely in terms of third-party effects cannot make sense of the idea that what justifies such laws is the harm that murder causes *to the victim*. While, as a practical matter, third-party effects will justify prohibiting the vast majority of intentional killings, reference to third-party effects cannot explain our strong intuition that intentional killing should generally be prohibited to protect potential victims.<sup>14</sup>

Here the Christian theorist has access to resources that the secularist lacks. Unlike the secularist attracted to the Protection Thesis, the Christian can argue that the killing of a moral person always, indeed necessarily, involves a substantial harm to the victim. On this line of reasoning, killing a moral person necessarily results in harm by subjecting her to the risk of being judged by God before she has fully accepted the essential Christian doctrines. Whether one interprets hell literally as involving the subjection of the soul or resurrected body to unending torment or whether one instead interprets hell as involving an eternal separation from God, there is no greater harm, according to Christianity, to which one can be subjected.<sup>15</sup>

And it is important to realize that the justification for legally prohibiting murder under the Protection Thesis does not depend on the outcome of God's judgment. It is no defense for a drunk driver to say "Well, I didn't hurt anyone; so I shouldn't be punished." While it might be true that the drunk driver did not hit anyone, it is also true that she might have. Likewise, it is no defense for her to say "Well, she went to heaven anyway; so there are no grounds to blame or punish me" – even assuming a murderer could know this about his victim. While it might be true that the victim does not wind up in hell, it is also true that *she might have*. The Protection Thesis, as it is most plausibly construed, justifies the legal restriction of any behavior that subjects third parties to an unreasonable risk of harm.

Thus, while it is difficult to make a secularist argument linking the Harm and Offense Principles, which exhaust the limits of legitimate law-making authority under the Protection Thesis, with a general prohibition on killing in a way that harmonizes with our intuitions, no such difficulty



exists for the Christian philosopher. Intentional killing should be prohibited in nearly every circumstance because it necessarily subjects the victim to a risk of the gravest harm of all – the risk of eternal damnation. And that is a harm that is rightly protected against by the state.

#### *IV. Fetal Innocence and Abortion Law*

It turns out, however, that the view that killing necessarily subjects the victim to the risk of eternal damnation is subject to one important class of exceptions. Insofar as culpability presupposes moral knowledge, someone who lacks moral knowledge through no fault of her own is incapable of culpability and is hence exempt from divine punishment. Thus, for example, someone who instantiates a severe cognitive disability is saved without regard to either her behavior or her attitude towards Christian doctrine. Such a person is saved no matter how she behaves or what she believes.

The same is true of children before they have developed the capacity for moral reasoning. Such persons are incapable of culpability in either deed or belief and, as Abelard puts the point, “are saved without merit of their own, as for instance, infants, and attain eternal life by grace alone.”<sup>16</sup> Accordingly, under the assumption that fetuses are persons at the moment of conception and are hence the bearers of moral rights (though obviously not of moral obligations), it follows that fetuses that die before birth are, as a matter of moral necessity, saved without regard to personal merit.

One might nonetheless be tempted to think that premature death results in some harm to the fetus. After all, premature death results in the loss of a worldly life that admittedly has its charms: family, community, romantic and sexual love, art, sport, and knowledge are all among the goods that make life worth living. Indeed, Don Marquis argues that what makes abortion wrong is that it deprives the fetus of exactly these sorts of goods:

[T]he misfortune of premature death consists of the loss to us of the future goods of consciousness. What are those goods? Much can be said about this issue, but a simple answer will do for the purposes of this essay. The goods of life are whatever we get out of life. The goods of life are those items toward which we take a pro attitude. They are completed projects of which we are proud, the pursuit of our goals, aesthetic enjoyments, friendships, intellectual pursuits, and physical pleasures of various sorts. The goods of life are what make life worth living.<sup>17</sup>

Thus, Marquis concludes, what makes abortion wrong is that it deprives the fetus of “a future like ours” – regardless of whether the fetus is a moral person.

Intriguingly, there is a sense in which the Christian theorist is in a better position than the secularist to take advantage of this sort of strategy. As a practical matter, secularist philosophers are considerably less likely than Christian philosophers to hold a form of substance dualism. To the extent that a Christian accepts the existence of souls that survive the death of the body, she can straightforwardly attribute a harm to the fetus’s soul that

results from premature death. Thus, whereas the secularist runs into trouble trying to identify a locus for the harm that is caused by death, the Christian encounters no difficulty on this score: the locus of the harm is the persisting soul of the prematurely deceased fetus.

Although Christianity's commitment to substance dualism makes possible such a line of argument, it is nonetheless untenable. The powerful response to the argument recalls Pascal's famous reasoning. Since the rewards a worldly life offers are always finite, it follows that the harm that results from being deprived of such a life is also finite. On the other hand, the benefit of what is essentially a free pass to heaven is infinite. Accordingly, whatever harm results from a premature death under such circumstances is infinitely outweighed by the benefit that results from an immediate and infinite salvation.

Indeed, it can plausibly be argued that premature death conduces maximally to the fetus's self-interest. To see this, imagine yourself in the following situation. While in the womb, you are temporarily made fully rational and offered the choice between a premature death and an opportunity to live a worldly life. The choice is expressed as follows. Should you choose a premature death, you will immediately experience a profound and eternal bliss – an ecstasy beyond any possible in this world. Should you choose an opportunity to live a worldly life, you will be judged at the end of your life for your deeds and beliefs. If you are judged favorably, you gain eternal bliss; if not, you will suffer eternal torment. You are also told there are many temptations that may lead you down a path that culminates in an unfavorable judgment so that the risk of such torment at the end of your worldly life is substantial. Finally, you are told that, after having made your choice, you will forget everything that you have been told. Assume that you have no idea whatsoever of what your post-natal circumstances will be. What should you do?<sup>18</sup>

The odds of a favorable judgment after a worldly life are probably not in your favor. While I would very much like to believe that we will all eventually find our way to God, this is not a common view among Christians. Indeed, when I ask students to estimate the percentage of people in the world who are likely to go to heaven, the most common response ranges from 10 to 15%.<sup>19</sup> The vast majority of us, on this view, have the unending torments of damnation ahead of us.

But the probability of a favorable judgment does not matter as long as it is less than 1. The smallest chance of an unfavorable judgment multiplied by the infinite cost attached to that judgment results in an infinite expected cost. No matter how good your worldly life might be, the expected benefit is finite. Thus, the expected value of choosing a worldly life is infinitely negative. Since the expected value of choosing premature death is infinitely positive, the only rational thing to do from the standpoint of self-interest is to choose premature death.<sup>20, 21</sup>

The blatantly self-interested character of the argument will undoubtedly appear counterintuitive and even repugnant to many readers. But a good part of religious motivation is rooted in self-interested desires for meaning, spiritual communion, peace of mind, and immortality; and this is a common theme among Christian thinkers. At the foundation of Kierkegaard's

strong fideism, for example, is the characterization of Christianity's import entirely in terms of self-interest. In distinguishing between what he calls the objective and subjective problems, Kierkegaard writes:

The objective problem is: Is Christianity true? The subjective problem is: What is the individual's relationship to Christianity? Quite simply, how may I, Johannes Climacus, participate in the happiness promised by Christianity" (413)?<sup>22</sup>

On Kierkegaard's view, then, what should really matter to the Christian is how to achieve the happiness associated with salvation and not whether Christian doctrine is objectively true. And in this connection it is worth noting that, while we may tend to resist such claims, we do not shy away from them when we proselytize: appeals to unbelievers typically make reference to the consequences of sin to well being.<sup>23</sup>

It is, of course, understandable why we do not like to acknowledge the role of self-interest in religious motivation. Any appeal to self-interest in religious motivation seems to diminish the sincerity of religious faith. The idea, for example, that Mother Theresa was motivated in all she did ultimately by a desire for salvation would rightly change our judgments about her exemplary character. For insofar as this is true, all that she did to alleviate suffering in the world would have been motivated by a selfish desire to secure her own advantage.

To say that self-interest forms an important part of religious motivation, however, is not to say that it exhausts such motivation. Nor is it to say that it reduces all religious sentiment to some sort of calculating attempt to maximize one's well being over the long term – any more than recognizing that self-interested motivation plays a role in romantic love reduces all romantic sentiment to such self-serving calculations. Even so, it is hard to deny that self-interest is an inescapable part of what we are both in faith and in the world.<sup>24</sup> But, in any event, it should be clear that, from the standpoint of Christian ethics, a self-interested concern with our own salvation is a perfectly acceptable reason for seeking a relationship with God. Accordingly, and notwithstanding the strong temptation to think otherwise, there is nothing ethically problematic in thinking that there is a sense in which, from the standpoint of fetal self-interest, premature death is a blessing.

What this means, then, is that if the Protection Thesis is taken as the standard that distinguishes sins that should be legally prohibited from sins that should be legally permitted, then abortion is a sin that should be legally permitted. Since harm, in the relevant sense, must be considered from the standpoint of the typical victim of an act and since the expected value to the fetus of being aborted is infinite, it seems to follow that abortion, though sinful, should be legally permitted. If this is correct, then we have constructed a coherent pro-choice position entirely out of materials that are available to sincere Christians.

At this point, one might be tempted to object that this analysis implies women *ought* to do their fetuses a favor and have abortions, but nothing of this sort follows. It is important to remember that this line of argument begins by conceding the sinful character of abortion; the conclusion is that

abortion, though always morally wrong, should be legally permitted. And the sinful nature of abortion provides a strong self-interested motive for a woman not to have an abortion. No matter how much benefit may accrue to the fetus, it does not mitigate the fact that committing an offense against God can *never*, all things considered, be in a person's self-interest.<sup>25</sup> Further, the sinful character of abortion provides a conclusive moral motive not to have an abortion. No matter how much benefit may accrue to the fetus and how benign the mother's motive in having an abortion, abortion remains a sin against God.<sup>26</sup> For this reason, the balance of moral and self-interested reasons *necessarily* operates against having an abortion.

And, as far as most choice advocates are concerned, this is as it should be. The vast majority of choice advocates concede the moral undesirability of abortion: abortion is always a morally objectionable outcome that should be discouraged. This, of course, is a judgment that such persons share with choice opponents. What the choice advocate denies is that the moral undesirability of abortion rises to the level of something that should be legally prohibited by the state. On the standard choice position, the fetus is not a person and hence does not have any right to life that could be infringed by an abortion. Thus, while choice opponents often seem not to realize this, the conviction that abortion is immoral is an important component of the standard defense of abortion rights. And that concession is also an important component of the abortion position described here.

## V. Objections and Replies

### A. Abortion and the Offense Principle

The first objection is a comparatively minor one. One might argue that a law prohibiting abortion can be justified by the Offense Principle. On this line of reasoning, allowing abortion will cause profound offense to opponents of abortion rights. For such persons, the very knowledge that abortions are being performed in the community is sufficient to cause precisely the sort of mental discomfort that the Offense Principle is intended to prevent. Thus, the argument concludes, if the Protection Thesis is true (i.e., that the Offense and Harm Principles exhaust the substantive limits of legitimate lawmaking authority), it follows that abortion should be legally prohibited.

The problem with this objection is that it misconstrues the scope of the Offense Principle as justifying the legal restriction of *any* conduct causing in third parties one of the disagreeable states that constitutes being offended. But, as proponents understand it, the scope of the Offense Principle is limited to protecting against offense that results from behaviors that are public in the sense of being reasonably observable by others. Thus, for example, the Offense Principle would justify prohibiting public nudity on the ground it would likely cause offense to others, but it would not justify prohibiting nudity in a hotel room or in one's home no matter how much offense such behavior might cause to others. The Offense Principle is a standard that governs public behavior and not private behavior.

Here it is worth remembering that the point of the Offense Principle, like the Harm Principle, is to define substantive constraints on democratic lawmaking authority. To construe the Offense Principle as reaching *every*

behavior, regardless of whether it is public or private, is inconsistent with this intent. For if enough people are moved by mental distress of some sort to vote to prohibit some purely private behavior (such as nudity in any other room than a bathroom), then the Offense Principle would justify restricting that behavior. But this seems simply to leave it up to the democratic majority to decide what behaviors should be prohibited and permitted; for, as a practical matter, the occurrence of behaviors a person wants prohibited usually cause her significant mental distress. Accordingly, this construction seems to imply that there are no content-based limits whatsoever on democratic lawmaking – and is thus inconsistent with the substantive intuitions that motivate the Offense Principle.<sup>27</sup>

### **B. Might Abortion Result in the Loss of Souls?**

The second objection seeks to identify a harm caused by abortion that justifies protective measures under the Harm Principle. This objection begins with the observation that we cannot know at exactly what point in the pregnancy the fetus acquires a soul and hence becomes a person.<sup>28</sup> If ensoulment takes place later on in the pregnancy, then it is possible to have an abortion prior to ensoulment. The worry here is that if the fetus is aborted prior to ensoulment and the creation of the soul occurs at the moment of ensoulment, then the abortion prevents the creation of the soul that would have inhabited the fetus. Thus, a pre-ensoulment abortion actually harms the would-be person by keeping its soul from being created. Since we cannot know exactly when abortions can be performed without causing such harms, all abortions should be legally prohibited.<sup>29</sup>

This intriguing objection reverses a popular strategy employed by opponents of abortion rights. Like the objection above, this strategy begins with the claim that we are not in a position to know exactly when during a pregnancy personhood begins. Since, on this line of reasoning, we cannot know when personhood begins and since post-personhood abortions are murder, we should prohibit all abortions to preclude the possibility of murdering unborn persons. But whereas this line of reasoning attempts to prevent a harm that would result if an abortion is performed *after* ensoulment, the ingenious objection described above attempts to prevent a harm that might result if an abortion is performed *before* ensoulment.

There is a straightforward response to this objection. Assuming that a pre-ensoulment abortion would prevent a soul from coming into existence, no harm can result because there is clearly nothing to serve as the locus of harm. It is conceptually impossible to harm a soul that does not exist. While I do not think the point needs defense here, it should be noted that the contrary assumption has a number of absurd moral implications. It implies, for example, that a couple that decides against having children wrongs the souls that would have existed if the couple had attempted to conceive.<sup>30</sup> Moreover, it implies that a person who decides to remain celibate for spiritual reasons wrongs the souls that would have existed had he or she decided not to remain celibate. If these consequences do not provide a conclusive refutation of this line of criticism, they certainly provide reasonable grounds for someone who wishes to defend a pro-choice view to reject the criticism.

### C. Third-Party Harms

One might argue that even if abortion does not cause harm to the fetus, it does cause harm to third parties.<sup>31</sup> On this line of reasoning, abortions frequently result in profound emotional distress to the mother that often has disastrous effects on marriages and families.<sup>32</sup> Accordingly, if the Protection Thesis is true, then a legal restriction of abortion is justified as a means of preventing these harmful effects.

There are a number of responses to this objection. Assuming these contested claims about the psychological consequences of abortion are correct, they do not entail that abortion should be prohibited under the Harm Principle. To begin with, it is not enough to justify a legal prohibition that abortion causes *some* psychological harm. Forcing an unwilling mother to carry a pregnancy to term also causes considerable psychological harm – and that is why there is an issue here to begin with. What would have to be shown to justify a restriction of abortion under the Harm Principle is that the psychological harm caused to mothers by allowing abortion is *greater* than the psychological harm caused to mothers by prohibiting abortion.<sup>33</sup> All things considered, it is reasonable at this point in time to think that allowing abortion is, as far as the Harm Principle is concerned, the lesser of the two evils.

The more serious problem, however, is that the Harm Principle does not operate to prevent harms that people do to themselves. As Mill forcefully puts it:

His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise or even right. There are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any-one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign (OL 13).

Accordingly, the harm that the mother causes to herself, no matter how profound, would not be a legitimate ground for restricting her freedom under the Harm Principle. Paternalistic reasons, on this view, can never justify restricting a person's freedom.

One might respond that the harm *caused to fathers* by abortion would justify restricting abortion under the Harm Principle. This argument suffers from the same defect as the last. To justify restricting abortion under the Harm Principle, it would have to be shown that the psychological harm caused to fathers by allowing abortion is greater than the psychological harm caused to fathers by prohibiting abortion. As should be obvious, unwilling fathers suffer a great deal of psychological distress from having to

bear responsibility for unwelcome children. But it is worth noting that even if this can be shown (an unlikely prospect, I think), it would justify, at most, a law requiring the consent of both mother and father as a precondition for allowing an abortion. It would not justify a complete prohibition on abortion because, as we noted above, the Harm Principle does not justify protecting people from harmful risks that they voluntarily and knowingly assume.

#### D. Original Sin and Fetal Innocence

A fourth objection attempts a different strategy for showing that abortion results in harm to the fetus. On this line of argument, all persons are stained by original sin and hence cannot be saved without the sacrament of baptism. The Catholic Encyclopedia describes this doctrine as follows:

Theologians distinguish a twofold necessity, which they call a necessity of means (*medii*) and a necessity of precept (*præcepti*). The first (*medii*) indicates a thing to be so necessary that, if lacking (though inculpably), salvation can not be attained; the second (*præcepti*) is had when a thing is indeed so necessary that it may not be omitted voluntarily without sin; yet, ignorance of the precept or inability to fulfill it, excuses one from its observance. Baptism is held to be necessary both necessitate *medii* and *præcepti*.... Christ makes no exception to this law and it is therefore general in its application, embracing both adults and infants. It is consequently not merely a necessity of precept but also a necessity of means.<sup>34</sup>

It follows, according to this doctrine, that "infants who ... depart this life without baptism, be it of water, or blood, or desire, are perpetually excluded from the vision of God."<sup>35</sup> No injustice occurs here because "[o]riginal sin deprived the human race of an unearned right to heaven."<sup>36</sup>

Like the preceding line of objection, this one concedes for the sake of argument that the Harm Principle defines the limits of legitimate lawmaking authority, but denies that it operates in support of legalizing abortion. Since, according to this argument, fetuses that die without baptism are eternally excluded from the vision of God, they sustain a profound injury.<sup>37</sup> Whether "perpetual exclusion from the vision of God" involves the torments of hell or the deprivation caused by separation from God, it involves an injury that is infinite because eternal in duration. Thus, *contra* my argument, the Harm Principle implies that abortion should be legally prohibited to protect fetuses from such injury.

Many Christians, of course, reject the view that baptism is necessary for salvation. John Calvin, for example, wrote:

Now, consequently, we must utterly reject the fiction of those who consign all the unbaptized to eternal death.... Nowhere do we find that [the Lord] has ever condemned anyone as yet unbaptized. I do not want anyone on this account to think of me as meaning that baptism can be despised with impunity...; it merely suffices to prove that baptism is not so necessary that one from whom the capacity to obtain it has been taken away should straightaway be counted as lost.<sup>38</sup>

Accordingly, Calvin concludes that "infants are not barred from the Kingdom of Heaven just because they happen to depart the present life before they have been immersed in water."<sup>39</sup>

There are a number of plausible theological and philosophical paths to this conclusion. One can, for example, reject the view of original sin grounding the claim that baptism is necessary for salvation. On this line of reasoning, the doctrine of original sin should not be construed as imputing guilt or culpability to persons. Rather it should be construed as an explanation of why we are psychologically so susceptible to temptation. Since original sin, then, does not result in guilt or culpability on the part of the fetus, baptism is not necessary as a neutralizing response.<sup>40</sup> Alternatively, one can reject the idea that third-party intervention is necessary for salvation. On this view, while the church serves valuable instrumental purposes (such as providing education), there is no need for the intervention of a church authority in the relationship between God and the believer. Finally, and more philosophically, one can reject the idea that a morally perfect God would penalize a person, such as a fetus, who is incapable of moral agency. But no matter how one reaches this conclusion, the result for our purposes is the same: assuming the fetus is a person, a fetus who dies prematurely gets the infinite benefit of, so to speak, a free pass to heaven.

While I find this latter view considerably more plausible than the view that baptism is necessary for salvation, there is no need to defend this point here. As will be recalled, my point here is merely to show how a pro-choice position can be constructed, even under the assumption that the fetus is a person, out of materials available to a Christian. To the extent that there is nothing in the core of Christian doctrine that entails that innocents who die without the grace of baptism are thereby excluded from the vision of God, it is open to a sincere Christian to deny that doctrine.<sup>41</sup>

### **E. The Infanticide Objection**

The most serious objection to my argument is that it would also justify a law permitting infanticide. As I have argued, permitting abortion is consistent with the Harm Principle because premature death infinitely benefits the fetus by providing a free pass to heaven; as will be recalled, fetuses are saved in virtue of their innocence. But exactly the same sort of argument can be made with respect to infants. Since infants are no more capable of sin than fetuses, it follows, according to this line of analysis, that premature death also infinitely benefits an infant by providing her with a free pass to heaven. Thus, it would seem to follow that if permitting abortion is consistent with the Harm Principle, then so is permitting infanticide.

There are a couple of ways to respond to this worry. First, one can simply hold that infanticide should be legally permitted at least within a period in which one can be certain that the infant lacks the sorts of cognitive abilities that would render her culpable and hence at risk for eternal damnation.<sup>42</sup> On this view, since the Harm and Offense Principles exhaust the limits of legitimate lawmaking authority and since infanticide does not result in harm to the infant, it follows that it would be illegitimate for a state to prohibit infanticide – no matter how profoundly sinful it might be.

I think that even the most radically liberal Christian should adamantly



refuse to bite this bullet. While it is worth emphasizing that conservative and liberal Christians can comfortably accept many of the premises in my argument, the implication that infanticide should be legally permitted would rightly strike the vast majority of Christians as an obvious *reductio* of one of the premises in the argument. Thus, this sort of analysis cannot serve as a viable foundation for a Christian pro-choice position unless we can show that it does not entail that infanticide should be legally permitted.

To this end, one might attempt to distinguish infanticide from abortion in the following way. Whereas abortion necessarily implicates a mother's interests in her health and *reproductive* privacy, infanticide does not. Thus, while abortion rights are necessary to enable a woman to realize these interests in the context of an ongoing pregnancy, infanticide rights do not uniquely conduce to the realization of any legitimate interests a mother may have. Whatever legitimate interests, if any, a mother may have in not parenting her infant can be realized by putting the child up for adoption. This important difference, the argument concludes, justifies treating infanticide differently from abortion.

For my purposes, the problem with this analysis is that it abandons the approach that I have adopted here. In particular, it abandons the thesis that the Harm and Offense Principles exhaust the substantive limits of democratic lawmaking authority. Regardless of what maternal interests are implicated by abortion and infanticide cases, it nonetheless remains true that premature death results in an infinite benefit to a moral innocent – and should hence be allowed if the only relevant principles are the Harm and Offense Principles. To make out this case, one would have to supplement these principles with another standard that distinguishes legitimate from illegitimate maternal interests and limits the application of the Harm Principle to cases implicating the former.<sup>43</sup>

A more promising response focuses on the harmful effects of allowing infanticide.<sup>44</sup> On this line of reasoning, societal tolerance for the killing of even newborn infants would have the effect of diminishing the respect that we have for human life in general and hence would be likely to increase rates of violent crime. Thus, allowing infanticide even in limited circumstances would have psychological effects that are likely to result in an increase of violence against people who are morally culpable and hence are at risk of eternal damnation.

The reason for this is that the physical similarities between infants and older persons play a profound psychological role in forming our ethical judgments with respect to the treatment of both. As Jane English explains this important connection:

Our psychological constitution makes it the case that for our ethical theory to work, it must prohibit certain treatment of non-persons which are significantly person-like. If our moral rules allowed people to treat person-like non-persons in ways we do not want people to be treated, this would undermine the system of sympathies and attitudes that makes the ethical system work.<sup>45</sup>

The idea here is a natural one: our ethical judgments about and *behavior*

towards non-infants are shaped in part by our ethical judgments about infants because of the conspicuous physical similarities between the two. Thus, to the extent that we legally permit the killing of infants, we are making more likely the killing of older persons who are subject to the risk of eternal damnation. Accordingly, a law prohibiting infanticide is justified under the Protection Thesis as a means of preventing this great harm.

At this point, the choice opponent is likely to object that this sort of reasoning applies equally to abortions. It is clear, for example, that a nearly nine-month-old fetus bears a conspicuous physical similarity to a newborn infant and hence to children and adults. Indeed, English concedes this very point: "A fetus one week before birth is so much like a newborn baby in our psychological space that we cannot allow any cavalier treatment of the former while expecting full sympathy and nutritive support for the latter" (ACP 241).<sup>46</sup> Accordingly, the choice opponent argues that if the physical similarities between infants and older persons justify restricting infanticide under the Protection Thesis, then the physical similarities between older fetuses and infants justify restricting late-term abortions under the Protection Thesis.

As it turns out, this line of pro-life argument has the effect of making the liberal position I am defending here more rather than less reasonable. It would be an embarrassment for the argument I have described if it allowed third-trimester abortions; for most choice advocates, Christian and non-Christian alike, support abortion rights only during the early stages of pregnancy. Indeed, the idea that abortions should be legally permitted up to the day of delivery is, on my view, profoundly objectionable. Thus, like-minded liberal Christians would, quite frankly, be relieved to concede that this line of argument provides a strong harm-based reason for a legal ban on both infanticide and third-trimester abortions.

But it is important to note that such an argument will not support a ban on early-term abortions under the Protection Thesis. As English persuasively puts the point:

Remember, however, that in the early weeks after conception a fetus is very much unlike a person. It is hard to develop these feelings for a set of genes which doesn't yet have a head, hands, beating heart, response to touch or the ability to move by itself. Thus it seems to me that the alleged "slippery slope" between conception and birth is not so very slippery. In the early stages of pregnancy, abortion can hardly be compared to murder for psychological reasons, but in the latest stages it is psychologically akin to murder (ACP 241-242).

While the issue of where to draw the line is a difficult one, it seems clear that the line cannot plausibly be drawn in the first trimester. Thus, a liberal-minded Christian can coherently take a pro-choice position with respect to abortions during the first trimester and during the beginning of the second trimester.

## VI. Conclusions

In this essay, I have attempted to show how a pro-choice position can be

constructed out of materials that are available in good faith to sincere Christians. I have argued that if the death of someone incapable of culpability results in a free pass to heaven, the premature death of a fetus results in no harm to the fetus. Thus, if the Protection Thesis is true, then abortion can legitimately be permitted – even on the strong assumption that the fetus is a person.

Now it is one thing to say that a position is coherent and another thing to say that it can sensibly be adopted. While I think the position elaborated here is coherent and consistent with the core of Christian doctrine, I am not sure I would characterize this as the most sensible way to take a pro-choice position. The reader may be heartened to know that, while I find this line of reasoning quite interesting, I am also made extremely uncomfortable by it. Though it is hard for me to pinpoint exactly what is bothering me about the argument (since I find all of the premises extremely plausible),<sup>47</sup> my emotional response leads me away from it as a front-line defense of abortion rights.

Nevertheless, I think these considerations do have a sensible place in a pro-choice position. Many Christians adopt a pro-choice position on exactly the kinds of argument that ground the pro-choice views of non-Christians. Some Christians take the view that the fetus is not a person until later on in the pregnancy<sup>48</sup>; others take the view that considerations of reproductive autonomy operate in favor of permitting abortion.<sup>49</sup> I happen to think these views are, in the relevant sense of the term, sensible positions that can (and should) be taken by conscientious Christians.

By my lights, the most sensible role for the argument described here is as something that augments these legitimate grounds for supporting abortion rights. One can argue that even if it turns out, for example, that the fetus is a person at the moment of conception,<sup>50</sup> there is no harm that can possibly result from an abortion to the fetus. Likewise, the claim that the fetus is not harmed by abortion entails that the effects of abortion on fetuses cannot be used as a counterweight to considerations of reproductive autonomy. Accordingly, the potential harm to the fetus is nullified as a ground for objecting to these pro-choice arguments.

Of course, these maneuvers are not likely to placate strongly pro-life Christians or make a pro-choice position more comfortable. But there is nothing particularly special in this regard about my approach. Christian and non-Christian choice advocates frequently experience a good deal of discomfort with their positions; the moral significance of the fetus weighs heavily in the balance of reasons – as it should. Such discomfort, then, comes with the territory. And there is little that can be said to change the fact that choice opponents frequently find pro-choice views profoundly offensive (though one would like to see a more deeply felt appreciation on the part of choice opponents for the moral significance of reproductive autonomy). Like gay rights, the death penalty, euthanasia, and any other interesting moral issue, the issue of abortion gives rise to views that will always provoke discomfort of some kind. It is not an objection to the view I defend here that it cannot alleviate those inevitable pains and frictions.<sup>51</sup>

## NOTES

1. Of course, there is little in the way of Biblical evidence on the issue one way or another.

2. James S. Spiegel argues that a Christian can be morally pro-life and politically pro-choice only to the extent that "(a) [she] holds the [morally pro-life] view to be justifiable by theological reasons alone and (b) [she] believes the theological evidence to be only minimally sufficient to justify the [morally pro-life view]." See James S. Spiegel, "Can a Christian be Coherently Morally Pro-Life and Politically Pro-Choice?" *Christian Scholar's Review*, vol. 30, no. 1 (Fall 2000), 107-115, 115. The idea is that such a combination of positions is coherent only in the face of certain kinds of epistemic doubt about the morality of abortion. Though Spiegel is not a specific target of this paper, the arguments I make, if sound, show his view is incorrect.

3. Presumably, a person may consent to the state's enacting restrictions on her own freedom.

4. For an outstanding discussion of the various issues implicated by the anarchist critique of authority, see Scott Shapiro, "Authority," forthcoming in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2001).

5. John Stuart Mill, *On Liberty* (New York: Alfred A. Knopf, 1992), 12. Hereinafter referred to as OL.

6. Joel Feinberg, *Offense to Others* (New York: Oxford University Press, 1985), 1.

7. Feinberg, *Offense to Others*, 1.

8. The Harm Principle, then, should be understood as asserting only that it is permissible for the state to prohibit behaviors that cause harm to others. Thus, this construction does not entail Mill's view that the prevention of harm is the only legitimate ground for restricting freedom.

9. *Abelard's Ethics*, translated by J. Ramsay McCallum (Merrick, NY: Richwood Publishing Co., 1976); excerpted in Andrew B. Schoedinger, *Readings in Medieval Philosophy* (Oxford: Oxford University Press, 1996), 121-142, 132. All references are to the Schoedinger volume.

10. *Abelard's Ethics*, 132.

11. Peter Singer takes this view, arguing that the capacity for sentience is a precondition for having interests. See Peter Singer, *Animal Liberation* (New York: Random House, 1975).

12. See Kenneth E. Goodpaster, "On Being Morally Considerable," *Journal of Philosophy*, vol. 75, no. 6 (June 1978), 308-325.

13. Since my approach is not secularist, it does not depend on either of these assumptions.

14. One can see a related difficulty emerging in Peter Singer's views on the moral standing of animals. Singer, as is well known, rejects the idea that it is the capacity for abstract reasoning that gives rise to moral standing. On Singer's view, any being that is vulnerable to harm because it is capable of suffering has a claim to have its interests considered in the deliberations of moral agents. Since non-human animals are capable of suffering, it follows that non-human animals are entitled to what he calls equal consideration: "If a being suffers, there can be no justification for refusing to take that suffering into consideration. No matter what the nature of the being, the principle of equality requires that its suffering be counted equally with the like suffering – in so far as rough comparisons can be made – of any other being." Singer, *Animal Liberation*, 9. Accordingly, Singer wants to conclude that eating meat, at least in cultures where legumes, grains, vegetables and fruits are plentiful, is wrong because it serves no more worthy interest than culinary pleasure.

The problem, however, is that the principle of equal consideration seems to rule out eating only those animals that have been raised and slaughtered under *painful* conditions. If animals can be raised and slaughtered in a way that causes them no pain (something that cannot be ruled out *a priori*), then it seems that, on Singer's analysis, it would be permissible to eat them. Insofar as the notion of harm is conceptually linked to the capacity for suffering, it appears to follow that there is nothing inherently objectionable with killing since killing need not inflict suffering on the victim.

15. There are problems with this model. The idea that one's ultimate fate might depend on factors over which one lacks direct volitional control seems difficult to reconcile with God's moral perfection. For example, eternal damnation seems to be a morally inappropriate fate for someone who is killed five minutes before he would have accepted the Christian creed. For a discussion of these issues, see Linda Zagzebski, "Religious Luck," *Faith and Philosophy*, vol. 11, no. 3 (July 1994), 397-413; and Scott A. Davison, "Salvific Luck," *International Journal for Philosophy of Religion*, vol. 45, no. 2 (April 1999), 129-137. In any event, the view described above is common enough among Christians and remains viable in the absence of a compelling alternative.

16. *Abelard's Ethics*, 137.

17. Don Marquis, "An Argument that Abortion is Wrong," in John Arthur (ed.), *Morality and Moral Controversies*, 5th Ed. (Upper Saddle River, NJ: Prentice Hall, 1999), 187-195, 190.

18. Assume that God gives you moral permission to make the choice.

19. Assuming religious pluralism is false, simply eliminating non-Christians results in a sizeable reduction in the number of people eligible for heaven.

20. Expected value, expected cost, and expected benefit are defined as follows:

Expected benefit (A) = (probability that A occurs)(benefit if A occurs)

Expected cost (A) = (probability that A does not occur)(cost if A does not occur)

Expected value (A) = Expected benefit (A) + Expected cost (A)

It is worth noting that there are limits to the usefulness of expected value analysis when we are dealing with costs and benefits that accrue over an eternal interval. For the expected value of a reasonably pleasant eternal afterlife would be equal to the expected value of an infinitely pleasant eternal afterlife. Unfortunately, the arithmetic of infinite numbers does not distinguish among the various afterlives.

This, of course, is not surprising. Ordinary arithmetical operations behave strangely over infinite numbers. Thus, for example, if you add one countably infinite set to another, you wind up with a set that is countably infinite. Indeed, taking the generalized union of a countably infinite number of countably infinite sets results in a countably infinite set. For a number of interesting illustrations, see William Lane Craig, *Reasonable Faith* (Crossway Publishers, 1974).

This should not be thought to invalidate the general idea for a couple of reasons. First, one could simply represent the relevant costs and benefits by a very large finite number and get the same results – and no finite number would be too large to overvalue the costs of hell. Second, since we are not trying to compare one infinite option with another, the relevant problems do not arise. In any event, I think that, from the standpoint of rational self-interest the conclusion of the argument is obvious. I am grateful to Phil Goggans for pointing out this issue to me.

21. Indeed, it is worth noting that if you are given a choice between taking

your chances with a life that carries a substantial risk of eternal damnation and simply opting for non-existence, the rational thing to do seems to be to choose non-existence. Relative to the choice above, of course, this would be an especially unhappy decision to make. But it strikes me as the rational one to make if you are in the position of a fetus with no information about what sort of parents, character, abilities, and socio-economic circumstances you are likely to have.

22. Soren Kierkegaard, *Fear and Trembling*, edited and translated by E.H. Hong and H.V. Hong (Princeton, NJ: Princeton University Press, 1983).

23. Indeed, the Bible is itself quite explicit in appealing to self-interest: "For God so loved the world that He gave His only begotten Son, that whoever believes in Him should not perish but have everlasting life" (John 3:16).

24. I think it is fair to say that the attitude of believers towards their faith would change, at least minimally, if God were suddenly to disclose in no uncertain terms that there would be no life after death.

25. I am indebted to C. Stephen Layman for this point.

26. In this connection, it is important to remember that there is nothing in Christianity that commits one to a utilitarian theory of sinfulness. Indeed, one would think that Christianity is committed to a deontological model of sin – whether in the form of the divine command theory or in the form of some other theory.

27. One might also object that allowing abortion would result in moral harm, but this is not the sort of harm contemplated by the Harm Principle, as it is understood by liberals.

28. While substance dualism is no longer universally held by Christians, it remains common enough that the objection deserves consideration here.

29. I am indebted to Celia Wolff for this objection.

30. If, as some believe, contraception is wrong, it is not for this reason. Traditionally, the argument against contraception is grounded in the idea that the use of birth control contravenes God's intended purpose for sexual intercourse. The wrong consists, on this line of argument, not in some injury to a non-existent soul, but in willful abuse of sexual activity.

31. I am also indebted to Celia Wolff for this line of objection.

32. There have been a number of attempts to document the psychological harms caused by abortion to women and their families, which has come to be called "Post-Abortion Syndrome." See, e.g., Catherine Barnard, *The Long-Term Psychological Effects of Abortion* (Portsmouth, N. H.: Institute for Pregnancy Loss, 1990).

33. Of course, this line of response does not take into account the physical harms that would result from the large number of self-induced abortions that would occur if abortion was prohibited and the psychological harms that would result to the child of someone who is forced to carry it to term.

34. *The Catholic Encyclopedia*; available at <http://www.newadvent.org/cathen/02258b.htm#IX>; Internet.

35. *Id.* There is some controversy about whether such infants are subject to the torments of hell. On one view, infants who die without baptism are eternally damned. On another, they are "merely" separated from God. There are two different possibilities here: (1) separation from God with knowledge that God exists and is forever inaccessible; and (2) separation from God without knowledge that God exists. While the latter, of course, involves a deprivation, it is considerably less painful than the former. I am grateful to Jon T. Wheeler for this latter distinction.

36. *Id.*

37. It is worth noting that, assuming the fetus is a person, it is not just aborted fetuses that sustain this injury; fetuses that are miscarried also sustain this

injury. *Any* fetus that dies in *any* manner without the grace of baptism is condemned to being perpetually excluded, on this doctrine, from the vision of God.

38. John T. McNeill (ed.), *Calvin: Institutes of the Christian Religion* (Philadelphia: Westminster Press, 1960), IV, XVI, 26.

39. *Id.*, IV, XV, 22.

40. I am grateful to C. Stephen Layman for pointing this out to me.

41. One might argue in response that since we cannot conclusively know whether God punishes the participation in original sin by infants and fetuses that die without baptism, we should not risk their eternal damnation by allowing abortion. This is a significantly different application of the pro-life strategy we encountered earlier in Section 5.2. The objection in that section was that since we cannot know when ensoulment begins and pre-ensoulment abortion results in a profound harm, we should not permit abortion at all. It is important to note that this line of objection concedes each of the doctrines adduced in my argument but it claims that they do not justify allowing abortion.

In contrast, the objection in this context challenges one of the doctrines on which the argument relies, namely the doctrine of juvenile innocence. The idea here is that we cannot know whether the doctrine of juvenile innocence is true and hence should prohibit abortion to prevent this possible harm to the fetus. While I am inclined to believe that it is obvious that a just God would not penalize agents conceptually incapable of culpability, it is beyond the scope of this paper to defend that position. My point here is to show how a coherent pro-choice position can be constructed out of materials that are open to the Christian to accept. I do not wish to defend the doctrine of juvenile innocence here any more than I want to defend the claim that the Harm Principle correctly defines the substantive limits of lawmaking authority. Since coherence is not the only adequacy criterion, these issues must obviously be resolved at some point; but this is not the place to do it.

42. One might be tempted to respond to this objection as follows. Just as there is no way to conclusively determine when personhood begins, there is no way to conclusively determine when during the life of a child moral awareness (and hence culpability) begins. Accordingly, there is no way to determine conclusively when during the life of a child premature death subjects a child to the grave risk of eternal damnation. Since, given the magnitude of the potential injury, we should never subject any person to even the slightest risk of such an injury, it follows that infanticide should be legally prohibited. But since we can be sure that moral awareness cannot occur until after birth, abortion may safely be permitted without subjecting a fetus to such a grave risk.

The problem with this line of reasoning, I think, is that most researchers who study the psychological, physiological, and neurological characteristics of infants would argue we can conclusively rule out the possibility of moral awareness in very young infants. Thus, for example, most medical and psychological researchers would agree that it is just not nomologically possible for a one-hour-old newborn to have developed moral concepts. Indeed, at that stage of development, an infant does not even experience the world as being populated by discrete objects distinct from itself. Given this, it is causally impossible for a one-hour-old infant to have moral awareness. Thus, a blanket prohibition on infanticide cannot be justified on the strength of the claim that we can never determine whether an infant has the relevant cognitive abilities for moral awareness.

43. I see no reason to think this cannot be done, but this is not a move I want to attempt here.

44. I am indebted to Phil Goggans and C. Stephen Layman for pointing out the difficulties with an earlier line of response and for suggesting this one to me.

45. Jane English, "Abortion and the Concept of a Person," *Canadian Journal of Philosophy*, vol. 5, no. 2 (October 1975), 233-243, 241. Hereinafter referred to as ACP. While English is concerned here with identifying the moral rules we ought to accept, my concern is with identifying the *legal* rules we ought to adopt. Her views can naturally be adapted to this end.

46. Thus, she concludes, for example, that "it would be wrong for a woman who is seven months pregnant to have an abortion just to avoid having to postpone a trip to Europe" (ACP 242).

47. One possibility, of course, is just the discomfort that is involved in knowing one's views are extremely unpopular. Liberal Christians are an unfortunately isolated and much maligned minority among Christians.

48. See, e.g., Dolores E. Dunnett, "Evangelicals and Abortion," *Journal of the Evangelical Theological Society*, vol. 33, no. 2 (June 1990), 215-226. As she puts it, "It seems that when the fetus is able to live outside the mother it is to be considered a valued, actual human being and not just a potential human being. Actual life takes place, it seems to me, when the fetus is able to survive on its own outside the womb. Therefore until the fetus is able to exist in this fashion it is not considered an actual human being as we would consider the mother to be." Dunnett, "Evangelicals and Abortion," 220-21.

49. See, e.g., Virginia Mollenkott, "Reproductive Choice: Basic to Justice for Women," *Christian Scholar's Review*, vol. 17, no. 1 (March 1988), 289-296.

50. A prospect that strikes me as extremely unlikely. Indeed, the idea that personhood begins prior to brain activity strikes me as conceptually incoherent.

51. I am grateful to the following people who commented on earlier versions of this essay: Paul Glezen, Phil Goggans, C. Stephen Layman, Greg Oakes, and Celia Wolff. The argument is much improved for their thoughtful objections and suggestions.